IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6481

CLIFFORD H. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

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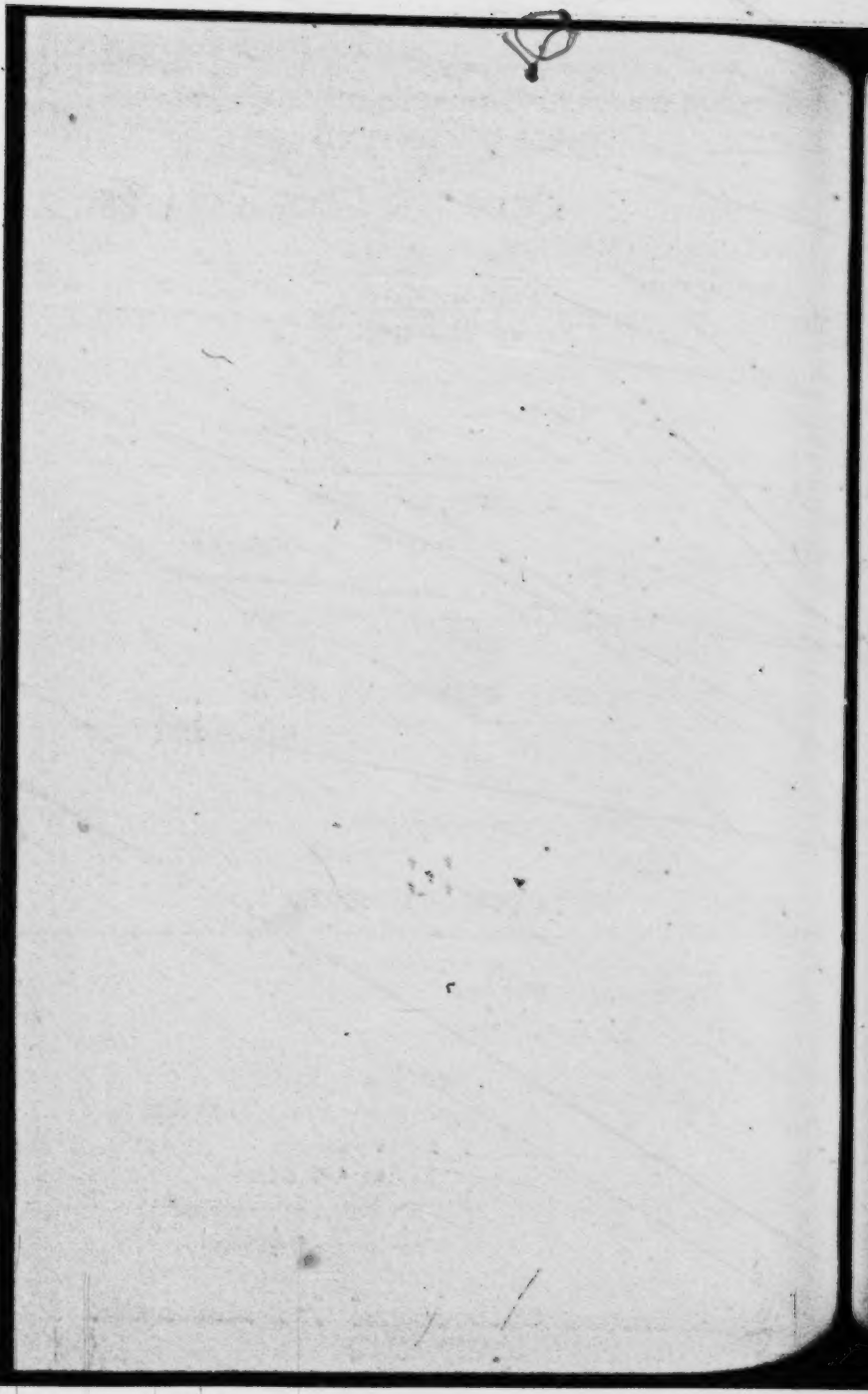

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OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the Northern District of Mississippi is unreported. It is set out in the Appendix, pp. 17-26. The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 455 F.2d 919 and is set out in the Appendix, pp. 33-34. The *per curiam* order denying a petition for rehearing is unreported. It is set out in the Appendix, pp. 36-37.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 20, 1972. A petition for rehearing was denied on February 25, 1972. The petition for a writ of certiorari was filed on April 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

§ 2255. Federal Custody; Remedies on Motion Attacking Sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral

attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Rule 12, Federal Rules of Criminal Procedure. Pleadings and Motions Before Trial; Defenses and Objections

* * *

(b) The Motion Raising Defenses and Objections.

(1) Defenses and Objections Which May Be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) Effect of Determination. If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the

defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations.

QUESTION PRESENTED

Whether Rule 12(b)(2), F.R.Crim.P., bars a post-conviction claim, under 28 U.S.C. 2255, that Negroes were systematically excluded from the federal grand jury which indicted petitioner, without proof that he had waived that claim understandingly and knowingly.

STATEMENT OF THE CASE

On January 30, 1968, an indictment returned in the United States District Court for the Northern District of Mississippi, charged petitioner, a Negro,[1] and two others with entry of a federally insured bank with intent to commit larceny in violation of 18 U.S.C. 2113(a). On February 18, 1968, petitioner appeared with counsel for arraignment and was given thirty days to file motions. On March 6, 1968, petitioner moved to quash the indictment on the ground that it grew out of an illegal and unauthorized arrest.[2] The motion was overruled. Following a jury trial commencing on May 6, 1968, petitioner was found guilty and was sentenced to fourteen years' imprisonment. On April 14, 1969, his conviction was affirmed on appeal, 409 F.2d 1095.

On January 18, 1971, petitioner filed a motion, pursuant to 28 U.S.C. 2255 to vacate his conviction[3] on

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[1] R.4 (paragraph 4).

[2] The motion to quash is included in the original record filed with the Clerk. It is unpaginated.

[3] The motion was styled "Motion to Dismiss Indictment."

the ground that Negroes were systematically excluded from the grand jury which indicted him.[4] The motion rested explicitly upon the Fifth and Sixth Amendments and 28 U.S.C. 1861, 1863 and 1864, and alleged that grand juries in the Northern District of Mississippi had been selected unconstitutionally for twenty years (paragraph 3). The motion also alleged that petitioner "had not waived or abandoned this right to contest the Grand Jury array as set forth in the Federal Rules of Criminal Procedure Rule 12(B)" (paragraph 5). In addition, the motion alleged "that a timely oral motion was made in open court *before trial* by his Court appointed lawyer, *Mr. Paul M. Moore*, Calhoun City, Mississippi, said motion was then denied by the trial judge, *Honorable William C. Keady*. Petitioner's counsel did not assign this as error on direct appeal" (paragraph 7). This assertion was repeated in petitioner's traverse (paragraph 5) (Appendix, pp. 7-8). He also alleged in his motion that a "*Law Student* who was researching the grand jury array question within, was *stopped* from seeing petitioner by the Lafayette County Sheriff, whereas this point of law was lost as to the research necessary to carry the burden which it places upon the 'defendant' " (paragraph 6) (Appendix, p. 8).

The government's response (Appendix, p. 13) denied that any objection to the composition of the grand jury was raised prior to or at trial.

Concurrently with the filing of his 2255 motion, petitioner filed a motion for discovery and inspection designed to ferret out the facts regarding the method of selection for the jury rolls in the Northern District of

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[4]The motion is set out in its entirety in the Appendix, pp. 6-8.

Mississippi across a twenty-year period (Appendix, pp. 9-12).[5]

The district court overruled petitioner's motion to vacate without a hearing. Relying upon *Shotwell v. United States*, 371 U.S. 341 (1963), the court held that "under Rule 12(b)(2) [F.R.Crim.P.] a federal criminal defendant who failed to object to alleged defects in the composition of the grand and petit juries before trial waived such objections" (Appendix, p. 21). The court also relied upon a series of Fifth Circuit cases which had come to the same conclusion (Appendix, pp. 23-25). It rejected the Ninth Circuit's contrary rule in *Fernandez v. Mier*, 408 F.2d 974 (1969). As to federal habeas cases involving state prisoner claims of racial exclusion, the district court distinguished those on the ground that they "did not involve the interpretation of Rule 12, F.R.Crim.P." (Appendix, pp. 23-24).

Having concluded that petitioner "waived his objection" (Appendix, p. 23), the court inquired whether it should exercise the discretion allowed it by Rule 12(b)(2) "for cause shown." Finding neither "exceptional circumstances" nor "actual prejudice," the court concluded there was "no cause" (Appendix, p. 25).

Treating petitioner's claim that his attorney had made an oral motion before trial to challenge the method for selecting the grand jury, the trial judge, relying on his recollection of the proceedings and his review of the

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[5]The district court conceded that "the method of selecting grand jurors then in use [at the time of petitioner's indictment] was the same system employed by this court for years" (Appendix, pp. 24-25).

transcripts and docket entries, concluded that no such motion was made.[6]

On appeal, the Fifth Circuit affirmed on the basis of *Shotwell* and Rule 12(b)(2).

SUMMARY OF ARGUMENT

I. This case is controlled by *Kaufman v. United States*, 394 U.S. 217 (1969), which held that a claim of illegal search, said to have been waived below either because not raised or not appealed, is a proper claim to be heard on post-conviction review by a §2255 motion filed by a federal prisoner. The Court, relying upon *Townsend v. Sain*, 372 U.S. 293 (1963) and *Fay v. Noia*, 372 U.S. 391 (1963), held that constitutional claims could be reviewed by a §2255 motion on behalf of federal prisoners to the same extent as state prisoners.

Petitioner's claim alleges that he was indicted by a grand jury from which members of his race were systematically excluded. That claim rests upon a constitutional right which has been recognized and enforced by this Court for almost a century, from *Strauder v. West Virginia*, 100 U.S. 303 (1879) to *Peters v. Kiff*, 407 U.S. 493 (1972). In addition, a claim of racial discrimination in jury selection goes directly to the integrity of the fact finding process. Furthermore,

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[6]The petitioner claims that these findings are necessarily based on an incomplete record because, he asserts, the original records of his trial are lost, including the court reporter's shorthand notes or tape. Petitioner's Reply Brief, pp. 1-2. The Solicitor General has confirmed that at least some of the original trial record "were missing from the Court files." Brief For the United States In Opposition, p. 3, n. 2. Cf., the order of the court below denying a petitioner for rehearing, Appendix, p. 36-37.

petitioner will be presumed to have been prejudiced because of the exclusion of members of his race from the grand jury. *Peters v. Kiff, supra* at 509 (Burger, Ch. J., dissenting). For all these reasons, petitioner's claim is well within the parameters of *Kaufman v. United States*.

II. *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341 (1963), relied upon by the courts below to support their rigid application of Rule 12(b), F.R.Crim.P. to the petitioner, is distinguishable: (1) The objections to the jury selection process in *Shotwell* predominantly involved legal irregularities, not constitutional defects; (2) There was no showing of prejudice in *Shotwell*; (3) The petitioners in *Shotwell* had had a hearing on their objections at trial.

III. Petitioner may be precluded only if it is established, as required by *Fay v. Noia*, that he "understandingly and knowingly" waived his claim in the trial court. Though *Noia* involved a state prisoner's post-conviction claim, its review of the history, breadth, and purpose of the federal writ of habeas corpus, apply equally to federal prisoners as they do to state prisoners. Critics of this Court's decisions concerning the scope of post-conviction review, including Judge Henry Friendly and Professor Paul Bator, would allow petitioner's claim to be heard.

Cases decided by the Fifth Circuit concerning state prisoners which are otherwise factually identical from the case at bar, allowed post-conviction relief and, cannot be distinguished on principle from petitioner's case.

ARGUMENT

I.

KAUFMAN V. UNITED STATES CONTROLS THE DISPOSITION OF THIS CASE.

This case is controlled by *Kaufman v. United States*, 394 U.S. 217 (1969). The petitioner in *Kaufman* was tried and convicted on charges of armed robbery of a federally insured savings and loan association. At trial, petitioner's appointed counsel had objected to the admission of certain evidence on grounds of unlawful search and seizure, but newly appointed appellate counsel did not assign the admission of the evidence as error either in his brief or on oral argument. A letter from petitioner to his appellate counsel asking him to submit the illegal search issue to the Court of Appeals was given to the panel after oral argument. The Court of Appeals affirmed the conviction without reference to the search and seizure claim. 394 U.S. at 393, n. 3.

Petitioner then filed a 2255 motion which included a claim that the finding of sanity was based upon the improper admission of unlawfully seized evidence. As to that, the district court said: "The record does not substantiate this claim. In any event, this matter was not assigned as error on Kaufman's appeal from conviction[7] and is not available as a ground for collateral attack on the instant §2255 motion." 268 F. Supp. 484, 487 (1967).[8] On a writ of certiorari here, the district court

[7] It is unclear from the opinions whether the search claimed to be illegal in the 2255 motion was the same search claimed to be illegal at trial.

[8] Applications for leave to appeal as a pauper having been denied by both the district court and court of appeals, the case was not heard by the Eighth Circuit.

was reversed. This Court held "that a claim of unconstitutional search and seizure is cognizable in a §2255 proceeding." 394 U.S. at 231.[9]

In deciding *Kaufman*, this Court was confronted by the United States with three principal arguments: first, that a motion under 2255 cannot be used in lieu of an appeal (394 U.S. at 222-223); second, that unlike other claims which have been allowed on 2255 motions, a claim of illegal search and seizure does not impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable (394 U.S. at 224); and, third, that "federal post-conviction relief should not be available to federal prisoners in as broad a range of cases as that when presented by state prisoners" (394 U.S. at 225-226).

Treating the first objection, the Court, relying upon *Sunal v. Large*, 332 U.S. 174 (1947), contrasted "errors in trial procedure which do not cross the jurisdictional line," on the one hand, with "relief for *constitutional* claims asserted by federal prisoners," on the other.[10] Where the latter are concerned, federal habeas corpus relief[11] is not limited by the rule that "a motion under

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[9] *Kaufman* has since been applied to allow a 2255 claim alleging the use of an involuntary statement in evidence though not raised at trial, *Howell v. United States*, 442 F.2d 265 (7th Cir. 1971), and to a claim that incriminating statements were admitted into evidence, though again there was no objection at trial, *Tucker v. United States*, 427 F.2d 615 (D.C. Cir. 1970).

[10] *Sunal v. Large* itself involved a non-constitutional trial error. *Kaufman v. United States*, 394 U.S. at 223, n. 7.

[11] The scope of a 2255 motion is, of course, as broad as the writ of habeas corpus. *United States v. Hayman*, 342 U.S. 205 (1952); *Hill v. United States*, 368 U.S. 424 (1962); *Sanders v. United States*, 373 U.S. 1 (1963); *Kaufman v. United States*, 394 U.S. at 221-224.

§2255 cannot be used in lieu of appeal."[12] As to the second objection, the Court held that "the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake" (394 U.S. at 225).

The government's third argument rested on several propositions: (1) the necessity that federal courts have the last say with respect to questions of federal law; (2) the inadequacy of state procedures to raise and preserve federal claims; (3) the concern that state judges may be unsympathetic to federally created rights; and (4) the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state court proceedings. To all of those, the Court responded:

> The opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief; otherwise there would be no need to make such relief available to federal prisoners at all. The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief.

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[12] See, *United States v. Alloco*, 305 F.2d 704 (2nd Cir. 1962), *cert. denied* 371 U.S. 964 (1963), which allowed collateral attack on a claim that the trial judge was appointed illegally. The issue was not raised on trial or appeal. The Second Circuit held that "the present case . . . raises such important issues that we believe that petitioner should not be foreclosed from asserting them in this collateral proceeding" (at 707); *Haith v. United States*, 330 F.2d 198 (3rd Cir. 1964), which held that a claim that trial judge was not present when jury was selected, was "of such fundamental importance" (at 200), a 2255 motion would be heard. Cf. *United States v. Stirone*, 341 F.2d 253 (3rd Cir. 1965), *reversed on other grounds*, 381 U.S. 902 (1965).

This is no less true for federal prisoners than it is for state prisoners (394 U.S. at 226).

Reviewing *Townsend v. Sain*, 372 U.S. 293 (1963), the Court concluded that with the single exception of the fact-finding procedure, all the considerations supporting federal court review of state prisoners' constitutional claims apply equally to federal prisoners. "We perceive no difference between the situations of state and federal prisoners which should make allegations of the other circumstances listed in *Townsend v. Sain* less subject to scrutiny by a §2255 court" (394 U.S. at 227). Furthermore, invoking *Fay v. Noia*, 372 U.S. 391 (1963), which rejected "conventional notions of finality" in state criminal litigation, the Court said "there is no reason . . . to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomolous and erroneous view of federal-state relationships" (394 U.S. at 228).[13]

The facts of the case at bar are clearly encompassed by the *Kaufman* analysis; in one central respect they are even more compelling.

First, the issue in this case, the right to indictment by juries selected without racial discrimination, is a constitutional right which has been recognized and enforced by this Court for almost a century, from *Strauder v. West Virginia*, 100 U.S. 303 (1879), to *Peters*

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[13]In *Sanders v. United States*, 373 U.S. 1, 18 (1963), decided the month following *Noia*, the Court, deciding a 2255 case, said of the question of foreclosure of federal collateral relief, "The principles developed in [*Noia* and *Townsend*] govern equally here."

v. Kiff, 407 U.S. 493 (1972).[14] It is an elementary right that implicates a variety of values of a free society. The bias which inheres in a grand jury from which a particular race has been excluded (see *Peters v. Kiff, supra*), is a "fundamental defect which results in a complete miscarriage of justice . . . [and is] inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962). As this Court recently noted in *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970), "The exclusion of Negroes from jury service because of their race is 'practically a brand upon them . . . , an assertion of their inferiority . . . .' That kind of discrimination contravenes the very idea of a jury—'a body truly representative of the community,' composed of 'the peers or equals of the person whose rights it is selected or summoned to determine . . . ' " The fact that it has been a crime since 1875 to disqualify anyone from jury service because of race or color,[15] reflects the special significance of the constitutional right involved here. See *Peters v. Kiff, supra* at 505 (White, J., concurring). Furthermore the statute applicable at the time of petitioner's indictment, 28 U.S.C. 1863(c), explicitly forbade exclusion from grand or petit jury service "on account of race or color." The same prohibition, among others, is set out in the 1968 amendments. 28 U.S.C. 1862. The essentiality of the right to a fairly selected jury in federal prosecutions has also been emphasized by this Court in *Thiel v. Southern Pacific*, 328 U.S. 217 (1946); and in *Ballard v. United States*, 329 U.S. 187 (1946).[16]

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[14] The cases are collected in *Peters v. Kiff*, 407 U.S. at 496-497, notes 4-6.

[15] 18 U.S.C. §243.

[16] *Thiel* and Ballard were decided on supervisory power grounds. References in both cases to the Sixth Amendment and state jury exclusion cases, leave no doubt that the interests encompassed by

There can therefore be no dispute that the right asserted by petitioner here is well within the class of rights which have traditionally supported the exercise of the power of habeas corpus.[17]

Second, the feature of this case which makes it even more compelling than *Kaufman* is that the method of selection of the grand jury involves the integrity of the fact-finding process. That was a factor which the government put forward in *Kaufman* as a distinction between claims which should and should not support the allowance of post-conviction claims. The Court's most recent decision involving exclusion of Negroes from the jury selection system, *Peters v. Kiff, supra*, leaves no doubt of the centrality of grand and petit juries to the integrity of the criminal justice system.

Peters v. Kiff involved a white defendant in a state prosecution who alleged that Negroes were systematically excluded from the grand jury which indicted him and the petit jury that convicted him of burglary. The Court held that, as a matter of due process, the petitioner could

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the supervisory power are at least as broad as those subject to enforcement by the Fourteenth Amendment.

[17] In this case, in particular, there is good reason to believe that there is a high probability that petitioner's claims are sound, for the government concedes that, at the time of petitioner's indictment, jurors were selected in the Northern District of Mississippi by the "key-man" system. (Brief for the United States in Opposition, p. 4, n. 3.) The racially exclusive consequences of that system are described in *Rabinowitz v. United States*, 366 F.2d 34 (1966). The key-man system is prohibited by the Federal Jury Selection Act of 1968.

challenge the exclusion of Negroes because "Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well" (407 U.S. at 502). This conclusion on due process grounds, which provoked dissents from three Justices, is surely undebatable when, as in the case at bar, the claim is made by a member of the excluded class on equal protection principles, thereby raising a presumption of prejudice. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879). As Mr. Chief Justice Burger said dissenting in *Peters v. Kiff*, 407 U.S. at 509, "This presumption of prejudice derives from the fact that the defendant is a member of the excluded class . . . "[18]

Kaufman, therefore, is powerful precedent for the case at bar. It is, in fact, dispositive, but for the issue taken up in Point II.

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[18]See *Alexander v. Louisiana*, 405 U.S. 625 (1972), involving a challenge to the exclusion of Negroes to the grand jury by a black defendant, where the Court said: "The principles which apply to the systematic exclusion of potential jurors on the grounds of race are essentially the same for grand juries and for petit juries . . . " 405 U.S. at 626, n. 3. The Court made the same observation in *Peters v. Kiff*, 407 U.S. at 495: " . . . the principles governing the two claims are identical." For a catalogue of the centrality of juries to the integrity of the criminal justice system, see *Duncan v. Louisiana*, 391 U.S. 145, 151-159 (1968).

II.

SHOTWELL V. UNITED STATES IS DISTINGUISHABLE FROM THE CASE AT BAR

If there were no other considerations involved in the decision of this case but those which were canvassed in Point I, petitioner's claims would surely prevail. But there are, of course, the apparent obstacles presented by Rule 12(b)(2), F.R.Crim.P. and *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341 (1963).

Rule 12(b)(2) provides:

> . . . defects . . . in the indictment other than that it fails to show jurisdiction in the court . . . may be raised only by motion before trial . . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.

Construing Rule 12(b)(2), *Shotwell* said, "Petitioners concede, as they must, that this Rule applies to their objection to the grand jury array . . . " 371 U.S. at 362.

Petitioner's argument around 12(b) and *Shotwell* rests primarily upon the principles enunciated in *Fay v. Noia*. Before reaching that main argument, however, we would point out that the case at bar is not controlled by *Shotwell* because it is factually and conceptually distinguishable.

The petitioners in *Shotwell* were convicted of income tax evasion. On certiorari to this Court, the case was remanded for further proceedings on a suppression issue. 355 U.S. 233 (1957). On remand, the district court took additional evidence and again denied the suppression motion. At that stage of the case, petitioners filed

motions for a new trial and challenges to the original grand and petit jury arrays. 371 U.S. at 345. Those challenges alleged that the juries were "illegally constituted because the jury commissioner delegated his selection duties to one of his private employees; volunteers were permitted to serve on the juries; and the Clerk of the District Court failed to employ a selection method designed to secure a cross-section of the population." 371 U.S. at 361-362. In this Court, the petitioners conceded, "as they must" said Mr. Justice Harlan, that Rule 12(b)(2) barred their objections to the grand jury array.

The concession by petitioners in *Shotwell*, leading to the easy conclusion by Mr. Justice Harlan that they had no alternative, of course deprived this Court of any adversarial perspective on the issue and cannot be deemed conclusive against petitioner here. The nature of petitioner's case, resting as it does on the fundamental constitutional claim that he was indicted by a grand jury from which members of his race were systematically excluded, requires this Court to examine the issue freshly without being bound by the *Shotwell* concession. Indeed, that concession need not and should not have been made, since it was apparent at the time *Shotwell* was argued, that this Court treated objections to the composition of grand and petit juries similarly, without reference to their different functions. See Point I, *supra* note *18*. For that reason, the factual distinctions set out below between the case at bar and *Shotwell* must be taken as relevant even though the former involves grand juries and the latter petit juries. Those distinctions are threefold.

First, the objections to the array in *Shotwell* involved legal irregularities which did not rise to the dimension of the fundamental constitutional right asserted by peti-

tioner at bar. 371 U.S. at 361-362.[19] Likewise, the facts in *Scales v. United States*, 367 U.S. 203 (1961), relied upon by Mr. Justice Harlan in construing Rule 12(b)(2), 371 U.S. at 362, n. 24, involved only illegalities: failing to select the grand jury panel "from a box containing the names of at least three hundred qualified persons" and "insufficient investigation of the persons on the list." 260 F.2d 45.[20]

Second, *Shotwell* said that "... both courts below have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the

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[19]One of the objections in *Shotwell* did assert that the Clerk failed to employ a selection method designed to secure a cross section of the population. That is, of course, a very substantial defect which has invoked the exercise of the Court's supervisory powers over the administration of justice in the federal courts, *Thiel v. Southern Pacific, supra; Ballard v. United States, supra,* and which would justify reversal of state court convictions on constitutional grounds. But that apparent inconsistency must be read in light of our third distinction between *Shotwell* and the instant case which points out that, in fact, the *Shotwell* petitioners had a hearing on their claims, but were unable to sustain them on the merits. 371 U.S. at 363. That would explain the Court's conclusion that "*In the circumstances of this case*, petitioners' contentions are without foundation" (*Ibid.*) (emphasis added).

[20]In addition *Scales* conceded that "the defendant was not prejudiced" (*Ibid.*). Absence of prejudice, as well as the absence of any constitutional violation, was also found in *United States v. Clancy*, 276 F.2d 617, 632, *reversed on other grounds*, 365 U.S. 312 (1961), another case relied upon by Mr. Justice Harlan. See discussion of prejudice below. In the third case which Mr. Justice Harlan relied upon, *Miranda v. United States*, 255 F.2d 9 (1st Cir. 1958), a challenge to the composition of the grand jury based upon "the absence of women" (at 16), was denied because untimely. The report of the case supplies no other facts.

juries. Nor do petitioners point to any resulting prejudice" (371 U.S. at 363). In the case at bar, prejudice is presumed. *Peters v. Kiff*, 407 U.S. at 509.

Third, the trial court in *Shotwell* held a hearing on the objections to the jury. 371 U.S. at 363. Thus, the waiver finding was only an alternative basis for decision.[21] Petitioner here has had no hearing on his claim.

Given these distinctions, the Court should not consider the *Shotwell* construction of Rule 12(b)(2) controlling in this case. Rather, Rule 12(b)(2) must be construed under the principles enunciated in *Fay v. Noia*, as was Rule 41(e) in *Kaufman*.

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[21] An evidentiary hearing was also held in *Scales*. See 260 F.2d at 44-45. Moore's Federal Practice, ¶12.02[2], n. 21 is critical of *Scales* on that account:

> *Scales* was a Smith Act prosecution in which the defendant sought to raise the defense of unlawful selection of the grand jury. The motion was made *before trial*, twenty-five days after expiration of the extended period for making motions .... Instead of denying the motion as untimely, the trial court proceeded to hold a hearing on the grand jury issue. It thereafter denied relief on the merits, as well as on the ground of waiver. The Court of Appeals affirmed on the waiver ground only. Beside the fact that there was no waiver under Rule 12(b)(2), disposing of the issue on this ground makes little sense since a hearing was held and the merits of the motion decided by the trial court.

III.

PETITIONER MAY BE PRECLUDED ONLY IF IT IS ESTABLISHED THAT HE "UNDERSTANDINGLY AND KNOWINGLY" WAIVED HIS CLAIM IN THE TRIAL COURT.

A. The Waiver Principle in *Fay v. Noia* Applies In This Case.

At stake in *Noia* was the scope and function of the writ of habeas corpus, the Great Writ:[22]

> Its root principle is that in a civilized society, government must always be responsible for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. 372 U.S. at 402.

The opinion's comprehensive review of the history of the writ stressed its broad sweep and its indispensable role is protecting individual citizens from arbitrary and lawless action of government by which "the processes of justice are actually subverted." 372 U.S. at 471, quoting Mr. Justice Holmes in *Frank v. Magnum*, 237 U.S. 309, 346 (1915)) (dissenting opinion).

Given the principles underlying the writ, and the fundamental purposes it is meant to serve, the Court held in *Noia*, against strong arguments based on "the exigencies of federalism" (372 U.S. at 415), that state prisoners had recourse to federal habeas even though the state courts, because of the prisoner's procedural default, would not entertain the federal claim.

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[22] Again, 2255 is equivalent in every respect to the writ of habeas corpus. *Supra*, n. 11.

> . . . we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules must plainly yield to this overiding federal policy. 372 U.S. at 426-427.

The Court declared only two qualifications upon the exercise of the habeas power by the federal courts: (1) the state prisoner must first exhaust state remedies still open to him (372 U.S. at 435); and (2) the federal courts may deny habeas relief if the state prisoner has "deliberately bypassed the orderly procedure of the state courts" (372 U.S. at 438).[23]

By its own terms, the *Noia* thesis applies to post-conviction review of claims, at least of constitutional dimensions, of federal prisoners. The history of the writ, its breadth, and its purpose, as described in *Noia*, all apply to federal prisoners. Indeed, as *Noia* pointed out, the history of the application of the writ to review federal convictions, long pre-dated that decision. The opinion said explicitly that "restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction" (372 U.S. at 409), citing twenty-three cases dating back to 1877 to support the statement (note 17).

Of the two qualifications to the general *Noia* principle, only the waiver principle has application to federal prisoners. But its application to federal prisoners is

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[23] This principle was very recently reaffirmed in this Court's unanimous decision in *Humphrey v. Cady*, 405 U.S. 504 (1972). See also *Henry v. Mississippi*, 379 U.S. 443 (1965).

co-extensive to its application to state prisoners. *Kaufman v. United States, supra* at 228, so held: "... there is no reason ... to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants." Consequently, petitioner can be found to have forfeited his right to raise his claim only if his failure to comply with Rule 12(b)(2) is found to be the result of an understanding and knowing waiver, or a deliberate by-pass.

The Ninth Circuit has explicitly adopted this rule in *Fernandez v. Meier*, 408 F.2d 974 (1969). *Fernandez* too involved a claim of systematic exclusion, in that case of Spanish-Americans. After conviction he filed a 2255 motion on the exclusion claim, which he had not raised at trial. The question then was whether the defendant was precluded under Rule 12(b)(2). The court, rejecting *Shotwell*, held that, under *Noia* and *Sanders v. United States, supra*, he was not.[24] A subsequent Ninth Circuit decision reaffirmed that view. (*Chee v. United States*, 449 F.2d 747 (1971).) The Tenth Circuit seems now to have adopted the same view. *United States v. Dowell*, 446 F.2d 145 (1971), *cert. denied* 404 U.S. 984 (1971).

Even Judge Henry Friendly, one of the severest critics of this Court's decisions expanding post-conviction relief for both state and federal prisoners, believes that the precise kind of claim asserted here by petitioner deserves a collateral hearing. In his article, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 Univ. of Chi. L. Rev. 142 (1970), specifically addressing

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[24]The Ninth Circuit, by saying that "Perhaps the Court, in deciding *Sanders v. United States, supra*, might have chosen to rely upon Rule 12(b)(2) ..." (408 F.2d at 977), seems to have misread *Sanders*. However, that does not affect the court's application of *Sanders* and *Noia*.

post-conviction claims that go to "racial discrimination in the selection of juries" (*Id.* at 141), as well as to claims asserting improper influence upon jurors by a court officer, or that a jury was overcome by excessive publicity, Judge Friendly said:

> In such cases the criminal process itself has broken down; the defendant has not had the kind of trial the Constitution guarantees. To be sure, there remains a question why, if the issue could have been raised on appeal and either was not or was decided adversely, the defendant should have a further opportunity to air it. Still, in these cases where the attack concerns the very basis of the criminal process, few would object to allowing collateral attack regardless of the defendant's probable guilt. *Id.* at 151-152.

Another critic, Professor Bator, evidently agrees. In his article, Finality in Criminal Law and Federal Habeas For State Prisoners, 76 Harv.L.Rev. 441 (1963), he discusses the kind of claims which he believes can properly be heard collaterally. Though he does not specifically refer to jury discrimination, he does refer to bribed judges, mob domination, and torture (*Id.* at 455). "In all of them," he says, "the inquiry is initially directed, not at the question whether substantive error of fact or law occurred, but at whether the process previously employed for determination of questions of fact and law were fairly and rationally adapted to that task" (*Id.* at 456). Jury discrimination is certainly encompassed in that class of cases. And Professor Amsterdam, who would have decided *Kaufman* differently, would no doubt decide this case in petitioner's favor. See Search, Seizure and Section 2255: A Comment, 112 U.Pa.L.Rev. 378, 385-386 (1964).

The Court should take the occasion of this case, therefore, to adopt the rule that where a constitutional challenge to the system of selecting grand or petty juries is first raised by a 2255 motion, the principles of *Kaufman* and *Noia* are to be applied.

B. The Waiver Principle Put Forward by Petitioner Has Been Applied by the Fifth Circuit in State Prisoner Cases Identical to the Case at Bar.

In four cases decided by the Fifth Circuit, two of which pre-dated *Fay v. Noia*, that court applied the same waiver principles as did *Noia* to cases which, but for the fact they involved state rather than federal prisoners, are indistinguishable on principle from the case at bar. *United States ex rel Goldsby v. Harpole*, 263 F.2d 71 (1959), *cert. denied* 361 U.S. 838 (1959); *United States ex rel Seals v. Wiman*, 304 F.2d 53 (1962), *cert. denied* 372 U.S. 924 (1963) *Whitus v. Balkcom*, 333 F.2d 496; and *Cobb v. Balkcom*, 339 F.2d 95 (1964).

In these cases, the defendants, all black, were convicted of capital crimes and sentenced to death. None of them raised the jury exclusion issue at trial and were held to have waived that claim by the State courts.[25] Subsequently, on federal habeas corpus, the Fifth Circuit held that there was no waiver in any of the cases, notwithstanding non-compliance with state procedural rules, and they were all remanded to the various district courts for hearings. Without lengthy discussion of the

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[25] In *Harpole*, by the Mississippi Supreme Court; in *Seals* by the Alabama Supreme Court; and in *Whitus* and *Cobb* by the Georgia Supreme Court.

details of the four cases, it is adequate for present purposes to quote the Fifth Circuit's own summary of those cases:

> . . . [T]he prior decisions of this court have established three situations, all capital cases, in which a state criminal defendant's failure to object to jury composition will not constitute a waiver barring relief on federal habeas corpus. If defendant's counsel fails to consult with him concerning his rights (*Harpole*), or where there is failure to consult plus the fact that the evidence of systematic exclusion is neither known nor easily ascertainable at the time of trial (*Wiman*), or where the defendant or his counsel failed to object through fear of engendering hostility (*Whitus*), there is no valid waiver. (*Cobb v. Balkcom, supra* at 101-102.).

Cobb rested on *Fay v. Noia*, of course, as did *Whitus*.[26] But *Harpole* and *Wiman* had to look elsewhere for support. They found it in earlier cases of this Court. *Harpole*, after first reviewing the seriousness of the claim in constitutional terms rested on *Johnson v. Zerbst*, 304 U.S. 458 (1938), which held (263 F.2d at 76-79):

> . . . courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescense in the loss of fundamental rights.'

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[26]The Third Circuit has reached the same result on identical facts. *Wade v. Yeager*, 377 F.2d 841 (1967). In more recent cases, the Fifth Circuit again upheld federal habeas claims on jury exclusion grounds by state prisoners who had plead guilty. The court found the guilty plea an ineffective waiver because not made voluntarily or knowingly. *Colson v. Smith*, 438 F.2d 1075 (1971). *Winter v. Cook*, 466 F.2d 1393 (1972).

Wiman, likewise, reviewed the cases which characterized jury exclusion as a fundamental constitutional defect (304 F.2d at 65-67), and rested on *Price v. Johnston*, 334 U.S. 266 (1948), which held (304 F.2d at 68):

> The primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned. And, if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

These decisions, combined with this Court's holdings in *Noia* and *Townsend v. Sain*, which rejected any distinctions between post-conviction review of state and federal convictions, either as to the scope of that review or the effect of procedural defaults, lead inevitably to the result that the claim put forward by petitioner here, must be heard on a 2255 motion. That result is required, on the broadest ground, because petitioner's claim is of constitutional dimension. It is required, on a slightly narrower ground, because the specific nature of the claim, if proven, infects the integrity of the judicial system. It is required on the narrowest ground, because of the special circumstances, described graphically in *Harpole*, *Wiman*, *Cobb* and *Whitus*, which surround the assertion of racial exclusionary practices in the deep south.

But if that result is so inevitable, why was it not perceived by the Fifth Circuit in this case? Petitioner would suggest that the answer might be that the Fifth Circuit assumes that, no matter what the jury selection practises might be in the state courts in the South, and no matter how grisly a choice might confront a white lawyer and his black client in the assertion of such a claim in the

state courts in the South, such practices and such choices do not exist in the federal courts in the South. But given the cultural and political facts described in *Harpole*, *Wiman*, *Cobb* and *Whitus*, that can only be an assumption. Without a record and without any facts, neither the Fifth Circuit nor this Court can make such an assumption. It is precisely for that reason that petitioner's 2255 motion must be heard: first, to vet the whole issue of waiver, both in general and, if necessary, in terms of the special southern circumstances; and, second, to hear the motion on the merits should it be established that petitioner did not waive.

C. The Hearing on Remand.

On remand, the hearing afforded petitioner should consist of two stages. The first stage should inquire into the question of waiver in the terms set out in *Fay v. Noia*. Petitioner, of course, alleges in his motion not only that he did not waive the jury exclusion claim, but that such a motion was in fact made orally by his attorney. Even if that latter allegation is not sustained, further inquiry will be required to determine whether there was a *Noia* waiver, quite apart from whether any oral motion was made.[27]

If the proof is unable to support a finding that petitioner waived his claim, the second stage of the hearing will then go into the merits of the substantive claim concerning exclusion of Negroes from the grand jury.

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[27] The nature of the required hearing is described in *Machibroda v. United States*, 368 U.S. 487 (1962).

CONCLUSION

For the reasons set forth above, the decision below should be reversed and the case remanded to the district court for a hearing.

Respectfully Submitted,

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